No. 93-1086

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JESSIE WALSH,

Petitioner,

v.

JASON McKINLEY WARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE COURT OF APPEALS IMPROPERLY FAILED TO APPLY, IN A PRISON SETTING, THE STANDARD SET FORTH IN EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH, 494 U.S. 872 (1990) AS TO THE APPLICATION OF CONTENT-NEUTRAL REGULATIONS INCIDENTALLY IMPACTING RELIGIOUS BELIEFS.

II. WHETHER THE COURT OF APPEALS IS OBLIGATED TO APPLY THE SMITH STANDARDS BEFORE APPLYING THE STANDARDS SET FORTH IN O'LONE V. ESTATE OF SHABBAZ, 482 U.S. 342 (1987) AND TURNER V. SAFELY, 482 U.S. 78 (1987) REGARDING RESTRICTIONS OF RELIGIOUS PRACTICES IN A PRISON SETTING.

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JESSIE WALSH,

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v.

JASON MCKINLEY WARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW JESSIE WALSH, and Frankie Sue Del Papa, Attorney General of the State of Nevada, and file this petition for writ of certiorari seeking to vacate the Opinion of the Ninth Circuit Court of Appeals insofar as the issue presented herein.

. . .

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals was filed on July 30, 1993, and is reproduced in Appendix A. Ward v. Walsh, No. 91-15427. The petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on August 12, 1993. The Petition for Rehearing was denied on September 17, 1993 and is reproduced in Appendix B. The Order entering judgment in favor of defendant, which immediately preceded the circuit court litigation, was entered February 26, 1993.

JURISDICTIONAL STATEMENT

This is a civil rights action filed under 42 U.S.C. § 1983 in the United States District Court for the District of Nevada. A bench trial was conducted February 26, 1991. The district court found for the defendant, JESSIE WALSH, on all issues, and entered its judgment in

favor of defendant on February 26, 1991. [Appendix C]. Plaintiff filed his Notice of Appeal from the district court's order of judgment on March 20, 1991.

The Opinion of the Ninth Circuit Court of Appeals was filed July 30, 1993 [Appendix A]. Appellee filed a Petition for Rehearing and Suggestion for Rehearing En Banc on August 12, 1993, which was denied by the Court of Appeals on September 17, 1993 [Appendix B]. This petition for writ of certiorari is being filed within ninety days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc. Sup.Ct.R. 13. The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATEMENT OF THE CASE

Respondent Jason McKinley Ward (hereinafter "Ward") filed a civil rights complaint on June 22, 1989, alleging

violations of his First Amendment rights under the United States Constitution, as a result of his being restricted from practicing his religion. Ward sought injunctive relief only.

The parties filed their proposed joint pretrial order on August 8, 1990. The issue set forth therein which is relevant to this petition is:

> 1. Whether respondent's rights under the First Amendment to the United States Constitution were violated by petitioner's refusal to provide respondent with a diet consistent with respondent's religious beliefs?

Following a one-day bench trial before the United States District Court, District of Nevada, judgment was entered in favor of the defendant as to all issues. The judge, relying on O'Lone and Turner, found, as a matter of law and under the facts presented, the defendant was not required to provide plaintiff with a diet consistent with his religious beliefs.

On appeal, Ward raised several issues which were decided by the Ninth Circuit Court of Appeals. The Ninth Circuit ruled in favor of the defendant on all issues except the issue of providing Ward with a diet consistent with his religious beliefs. The issue relevant to this Petition which was presented to the Ninth Circuit was:

> 1. Whether the Court was obligated to apply the content-neutral analysis under Smith prior to applying the standards under O'Lone and Turner in a prison setting as to any requirement to provide Ward with a diet consistent with his religious beliefs.

SUMMARY OF THE ARGUMENT

This is an unusual case of national significance which has far-reaching impact on (1) the cost of operating state correctional facilities; (2) the ability of legislatures and prison administrators to effectively manage state prisons; (3) the impact of religious claims by inmates upon the ability of administrators to

effectively run state prisons; and (4) the cost to the public of defending against inmate civil rights lawsuits.

The Ninth Circuit Court of Appeals has ruled in this case that Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) has no application to a prison setting. [Appendix A, pp. 8051-8052].

The issue presented herein is whether an otherwise content-neutral policy is subject **solely** to the analysis applied to prison religious claims under O'Lone and Turner or whether a court is obligated to apply the Smith analysis first.

There is a split among the Circuit Courts as to the application of this Court's decision in Smith in a prison setting and its application to civil and state regulatory laws. The Ninth Circuit refuses to apply Smith to a state regulation which is content-neutral.

Every other circuit to consider the issue has applied Smith to content-neutral state regulations.

The implications of the application of Smith to a prison setting are broad and should focus on the due deference all courts should give correctional professionals in the difficult and expensive task of running this country's prison systems. Bell v. Wolfish, 441 U.S. 520 (1979); Pell v. Procunier, 417 U.S. 817 (1974).

This split among the circuits as to the application of Smith must be resolved to provide consistent guidelines for prison authorities, who contend with increasing and competing religious demands, limited budgets and safety and security concerns. In rejecting the application of Smith in a prison setting, the Ninth Circuit Court of Appeals has . . .

granted greater constitutional protection to inmates than to private citizens.

Permitting inmates to bring First Amendment claims involving prison regulations which are otherwise content-neutral without **first** applying Smith takes from prison officials the discretion and flexibility necessary to properly, safely and cost-efficiently run a prison with competing demands. Compelling prison officials to tailor regulations which are not designed to address religious beliefs, and to tailor each and every prison regulation so as not to offend religious beliefs, would be a tremendous burden directly impacting the safety and security of prisons.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRED IN HOLDING THE SMITH CASE HAS NO APPLICATION IN A PRISON SETTING.

II. SUBJECTING CONTENT-NEUTRAL PRISON REGULATIONS WHICH INCIDENTALLY IMPACT UPON RELIGIOUS BELIEFS OF INMATES TO THE ANALYSIS OF O'LONE

AND TURNER IMPROPERLY INFRINGES UPON THE DUE DEFERENCE COURTS MUST AFFORD CORRECTIONAL PROFESSIONALS.

A. Other Circuits Are Divided On This Issue.

1. Seventh Circuit

The Ward opinion was issued July 30, 1993 by Circuit Judges Choy, Noonan and O'Scannlain. In Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990), the Seventh Circuit held that the Smith decision "cut back to minute dimensions" the doctrine that requires government to accommodate at some cost minority religious preferences in a prison setting. In applying Smith, the Hunafa Court held that a prison's dietary policy was the equivalent of a general secular regulation that incidently happens to interfere with the free exercise of religion.

2. Third Circuit

The Third Circuit Court of Appeals has held that Smith applies to both criminal

and civil cases. Salvation Army v. N.J. Dept. of Community Affairs, 919 F.2d 183, 194 (3d Cir. 1990). Specifically, the Third Circuit held "the rationale of the Smith opinion is not logically confined to cases involving criminal statutes." Salvation Army, 919 F.2d at 195.

The Ninth Circuit's determination Smith has no application to a prison setting and is restricted to criminal cases only, was specifically rejected by the Third Circuit. "We see no reason why application of the compelling interest test to free exercise exemption claims concerning criminal statutes would be any more of a 'constitutional anomaly' than application to civil statutes." Salvation Army, 919 F.2d at 195-196.

Civil statutes must first be analyzed under the Smith test prior to applying the **compelling interest test** in the private sector. Salvation Army, 919 F.2d

at 193. The argument for this rationale is even more compelling when applied to prison regulations. This Court has long required a rational basis test, not a compelling interest test, regarding free exercise cases involving inmates. Turner and O'Lone; Washington v. Harper, ___ U.S. ___, 110 S.Ct. 1028 (1990). The Ninth Circuit's refusal to apply the analysis of Smith in the prison setting is inconsistent with Turner, O'Lone and Harper. This refusal gives inmates more First Amendment protection than to private citizens.

3. Sixth Circuit

The Sixth Circuit Court of Appeals applies Smith to civil statutes as well as Criminal Statutes. Vandiver v. Hardin County Bd. of Education, 925 F.2d 927, 932 (6th Cir. 1991). The Vandiver Court specifically ruled Smith did apply to civil statutes, even though Smith dealt

with a criminal statute. The Vandiver court found support from other circuits as well. Id. at 932.

In Vandiver, a local school district required students not enrolled in public schools, but, rather, enrolled in home study courses, to take state-mandated equivalency tests. Students in a religious-oriented home study program claimed this requirement was an impermissible infringement of their free exercise rights under the First Amendment.

Following this Court's decision in Smith, the Sixth Circuit rejected plaintiff's claims, holding that Smith applied to civil as well as criminal statutes. The Sixth Circuit found the equivalency regulations to be content-neutral and, thus, merely an incidental impact upon the students' constitutional rights. As such, the Sixth Circuit did

not find it necessary to analyze the impact of the content-neutral regulation upon the students' free exercise rights.

B. The Ninth Circuit Erred in Holding Smith Did Not Apply.

Under Smith, content-neutral regulations are those regulations which do not directly and specifically proscribe or prescribe religious practices. The right of free exercise does not relieve an individual of the obligation to comply with a valid, neutral law of general applicability on the ground the law incidently proscribes or prescribes conduct religion prescribes or proscribes. United States v. Lee, 455 U.S. 252, 263, n. 3 (1983), as cited in Smith, 494 U.S. at 877.

In applying Smith to civil as well as criminal statutes, circuit courts across the country have recognized the necessity of **first** determining if a statute is content-neutral **before** applying the

compelling interest test. Hunafa, Salvation Army and Vandiver, supra. Under Smith, if the statute in question is, in fact, content-neutral, the analysis is concluded and the statute is constitutionally valid.

The application of the compelling interest test in free exercise clauses is vitally important to a free society. However, this Court has long recognized prisons as unique societal entities in which constitutional analysis is applied under a different standard. In rejecting the strict scrutiny analysis in a prison setting, this Court in Turner spelled out the standard regarding prison regulations. Turner, 482 U.S. at 89. Since the Turner and O'Lone cases, the courts have applied a reasonableness test to prison regulations regarding fundamental constitutional rights, including religion. Harper, ___ U.S. at

___, 110 S.Ct. at 1037. This test is considerably different than the compelling interest or strict scrutiny test for citizens outside the prison walls.

Prior to Smith, courts analyzed a regulation or law for its impact upon religion, regardless of whether the regulation or law was content-neutral. This same analysis, albeit with a lesser standard, existed under the O'Lone standard prior to Smith.

The Smith case now requires courts to look at the actual wording of the regulation in question **before** looking at its impact. If the regulation directly mentions religion, the standards of Turner/O'Lone/Harper must be applied in a prison setting; if the regulation in question is content-neutral, that is, does not specifically address religion, Smith holds there is no further analysis

as to its incidental impact on religious practices.

In rejecting Smith, the Ninth Circuit continues to analyze the incidental impact of a prison regulation without considering whether it is content-neutral in the first instance. This practice places the constitutional rights of inmates above those of private citizens. Even more ominously, this puts inmates in the position of dictating to prison officials how prison facilities must be run and scarce state-resources allocated, in order to accommodate as many religious practices as there are inmates.

Every other circuit which has considered the Smith decision has determined it applies to regulations within the regulatory powers of the state. Thus, prior to applying the appropriate constitutional standard, these courts made an analysis as to

whether the regulation was content-neutral. Despite the importance of the appropriate constitutional test as to impact, such tests cannot be applied unless the regulation in question directly and particularly mentions religion. On the other hand, if the regulation in question directly refers to religion, it is then analyzed under the appropriate standard.

Prison officials must be free to regulate prisons and prisoners. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Turner, O'Lone, Harper, supra. There is also no question regulations impacting prisoners are not afforded the same standard of scrutiny as regulations which impact constitutional rights of free citizens. See: Jones, Turner, O'Lone, Harper, supra.

. . .

Prior to Smith, all regulations impacting the free exercise of religion, whether involving prisons or private citizens, were analyzed under the appropriate standard, whether compelling or reasonable. After Smith, all regulations impacting the free exercise of religion are now subject to an additional initial analysis: whether the regulation is content-neutral. Except, according to the Ninth Circuit, prison regulations.

By failing to apply the Smith analysis, the Ninth Circuit is inconsistent with this Court's decisions since the Jones case. Prison regulations should be subjected to the same content-neutral analysis as any other law outside the prison walls. Any other conclusion would invalidate the mandate of this Court in Smith.

. . .

CONCLUSION

For the reasons discussed above, the State respectfully requests this Court grant certiorari, receive briefs on the merits, and vacate that portion of the Ninth Circuit Court of Appeals opinion which rejected the Smith analysis.

Respectfully submitted.

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON McKINLEY WARD,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 91-15427
vs.	)	D.C. No.
JESSIE WALSH,	)	CV-N-89-00265-HDM
ASSOCIATE WARDEN OF	)	
PROGRAMS,	)	OPINION
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted November 6, 1992*
San Francisco, California

Filed July 30, 1993

Before: Herbert Y.C. Choy, John T. Noonan, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

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*The panel unanimously finds this case suitable for submission on the record and briefs and without oral arguments. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

SUMMARY

Individual Rights/Constitutional Rights/CrimiLaw and Procedure

The court of appeals affirmed in part and reversed in part a judgment of the district court and remanded. The appellate court held that whether an Orthodox Jewish state prisoner's kosher dietary requirements could be accommodated under *Turner v. Safley*, 482 U.S. 342 (1987), could not be determined until the district court made appropriate findings of fact on remand.

Appellant Jason Ward was the sole Orthodox Jewish prisoner at Ely State Prison in Nevada. He sued appellee Jessie Walsh, an associate warden, under 42 U.S.C. Section 1983 for injunctive relief from alleged infringements of his free exercise of his faith, including the failure to provide him with a kosher diet, with clothes made from a single fiber, with an Orthodox rabbi, and with a

guarantee that he would not be transported on the Sabbath.

The prison provided a pork-free diet to prisoners requesting it, but did not provide a full kosher diet. Because of the remoteness of the prison's location, Ward did not have access to an Orthodox rabbi. Because he was the only Orthodox Jewish prisoner, he did not have access to religious services and could not congregate with other followers.

The district court did not make findings regarding what was dietarily forbidden by Ward's faith, how great would be the disruption resulting from providing him with kosher meals, whether the prison had explored the possibility of such accommodation, the financial impact of such accommodation on the prison, or the feasibility of alternative partial accommodations. The court gave judgment for Walsh after a bench trial.

Ward appealed.

[1] The prison's policy of not providing special diets was related to its legitimate interest in a simplified food service. Thus, the first factor in the rights analysis under *Turner* weighed in favor of the prison.

[2] Because the prison's location and Ward's status so dramatically curtailed his religious practice, *Turner's* second factor, whether there were alternative means of religious practice left open, weighed in Ward's favor. [3] However, since denial of a kosher diet might require Ward to defile himself through action affirmatively forbidden by his faith, second-factor analysis of alternatives was hampered by the lack of findings by the trial court.

[4] The court's failure to make relevant findings prevented appellate determination of how heavily *Turner's*

third factor, the impact of accommodation on guards, other prisoners, and prison resource allocation, might weigh in Walsh's favor. [5] The same was true of the final factor, the absence of ready alternatives to the challenged prison practices. [6] Therefore, remand was necessary to allow the trial court to make appropriate findings on the second, third, and fourth factors.

[7] Ward's request for an injunction against the prisons transporting him on the Sabbath or holidays, comprising eighty-eight days in a year, [8] was not sustainable in light of the prison's policy to accommodate the religious beliefs of prisoners when at all possible in connection with transportation needs. [9] Nor did the prison have an affirmative obligation to provide an

. . .

Orthodox rabbi for Ward, [10] or to

furnish him with single fiber clothing.

COUNSEL

Jason McKinley Ward, in Propria Persona, Ely, Nevada, for the petitioner-appellant.

Marc P. Cardinalli, Deputy Attorney General, Carson City, Nevada, for the respondent-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

Jason McKinley Ward is the only Orthodox Jewish prisoner at Ely State Prison in Ely, Nevada. He brought suit under 42 U.S.C. § 1983, arguing that the prison infringes upon his First Amendment right to exercise freely his religion by not providing him with a kosher diet, clothes made from a single fabric, or an Orthodox rabbi; by not allowing him to have candles in his cell, and by refusing

to guarantee that he will not be transported on the Sabbath. He seeks injunctive relief only, and appeals pro se from the district court's judgment in favor of the warden after a bench trial.

I

Religion is the first of our rights under the First Amendment and the Bill of Rights. The right to the free exercise of religion is a precious American invention, distinguishing our Constitution from all prior national constitutions. The right to the free exercise of religion is to be jealously guarded. It is the right of a human being to respond to what that person's conscience says is the dictate of God. It is not a right to be readily trammeled by the state. A human being does not cease to be human because the human being is a prisoner of the state. "The free exercise right, however, is necessarily

limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987). *Turner v. Safley*, 482 U.S. 78, 89 (1987), provides the test for balancing those interest: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

Turner set forth four factors to be considered in determining when a regulation is reasonably related to legitimate penological interests. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89. Second, whether there are "alternative means of exercising the right that remain

open to prison inmates" must be assessed. *Id.* Third, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally" must be determined. *Id.* Fourth, "the absence of ready alternatives" to the regulation must be explored. The "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Id.*

The warden argues that free exercise claims of prisoners are no longer governed by *Turner*, but instead must be evaluated under the standard announced in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law or general applicability on the ground that the law proscribes (or

prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citation omitted). In reaching that conclusion, the Court noted that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79.

We see no reason to depart from *Turner*. The Supreme Court has held that *Turner* applies to all constitutional claims arising in prison with the exception of Eighth Amendment claims. *See Washington v. Harper*, 494 U.S. 210, 223 (1990); *see also Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (en banc). Moreover, the *Smith* case concerned a factual situation far different from the one presented here. Inmates must rely on the prison system to provide them with the necessities of

life. Determining to what extent prison officials must accommodate a prisoner's right to free exercise in fulfilling this obligation is wholly different from determining whether free citizens must obey criminal laws of general applicability.

II

Ward argues that the prison is obliged to provide him with a strict kosher diet at the prison's expense "that is certified or deemed religiously acceptable by an outside independent Orthodox Jewish Organization . . . at the time the food is physically served to Orthodox Jewish inmates." The diet requested by Ward would require the prison not only to provide kosher food but to store and to prepare the food in a special manner. Moreover, Ward requests that the food be served in an "eating area [that is] kept kosher for all Jewish

inmates."

We have held that "[i]nmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *McElyea*, 833 F.2d at 198. However, we have never determined precisely how this right is to be balanced against budgetary and administrative concerns of the prison.[1]

[1] The warden provides a pork-free

---

[1]Courts that have considered the question have reached varying results. *Compare, e.g., Kahane v. Carlson*, 527 F.2d 429 (2d Cir. 1975) (pre-*Turner* case holding that the Orthodox Jewish inmates are entitled to a kosher diet; difficulties in providing diet are surmountable) *and Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989) (prison policy which eliminated Jewish inmates' right to participate in annual Passover seder was an impermissible infringement upon the inmates' free exercise rights) *with Kahey v. Jones*, 836 F.2d 948, 950-51 (6th Cir. 1988) (prison not required to provide full kosher diet where doing so would be administratively unfeasible) *and Martinelli v. Dugger*, 817 F.2d 1499, 1507 n.29 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988) (same).

diet to inmates who request is, but does not provide a full kosher diet. Whether the culinary policy is reasonable requires a balancing of the degree of intrusiveness into the right of free exercise against the costs of accommodation, giving appropriate deference to prison officials' assessment of the costs. The *Turner* factors help focus this determination. the first *Turner* factor requires us to consider whether there is a logical connection between the policy and the legitimate governmental interest that justifies it. The prison has a legitimate interest in running a simplified food service, rather than one that gives rise to many administrative difficulties. *Kahey*, 836 F.2d at 950. Since the policy of not providing special diets is related to simplified food service, the first factor weighs in favor of the government.

The second *Turner* factor requires us to consider whether Ward has alternative means by which he can practice his religion. The relevant inquiry under this factor is not whether the inmate has an alternative means of engaging in the particular religious practice that he or she claims is being affected; rather, we are to determine whether the inmates have been denied all means of religious expression. *O'Lone*, 482 U.S. at 351-52. In other cases, courts have found that although some aspects of religious practice were impinged upon, claimants retained the ability to participate in other significant rituals and ceremonies of their faith. For example, although the Muslim claimants in *O'Lone* were denied the opportunity to attend Jumu'ah, the Muslim weekly religious service, they had the virtually unlimited right to congregate for prayer and discussion

outside of working hours. Moreover, the Muslim prisoners had free access to an imam, a Muslim prayer leader, who the state provided. Muslim prisoners were given special meals, and special arrangements were made during the month-long observation of Ramadan, a period of fasting and prayer, to allow them to take their meals at the religiously prescribed times. *Id.*

[2] In contrast, Ward's ability to participate in religious observances has been significantly circumscribed within the prison. Because of the remoteness of the area, he does not have access to an Orthodox rabbi. Since he is the only Orthodox Jewish prisoner in the institution, he does not have access to religious services. Moreover, he cannot congregate with other practitioners of his faith for prayer and discussion. It is true that Ward is encouraged to

practice other observances of his faith privately. The district court heard testimony from an Orthodox Jewish rabbi that private prayer is a significant aspect of the practice of the Jewish religion. However, we cannot conclude that the opportunity to engage in private prayer is enough to satisfy the second *Turner* factor as interpreted by *O'Lone*. If it were, the factor would have no meaning at all because an inmate would always be able to pray privately. *See Sample v. Borg*, 675 F. Supp. 574, 580 (E.D. Cal. 1987), *vacated as moot*, 870 F.2d 563, (9th Cir. 1989). In short, because Ward's religious practice has been so dramatically curtailed in prison, the second *Turner* factor weighs in his favor. *Cf. Kahey*, 836 F.2d at 950-51 (second factor weighed in prison's favor because there was no indication that Kahey had been deprived of the ability to

practice her religion in any other way).

[3] Also relevant to the evaluation of the second factor is a distinction *O'Lone* had no occasion to make: the distinction between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul. It is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion. In order to determine what alternatives are open to Ward, findings must be made as to what is or is not forbidden by his religion. The district court made no such findings; we must remand so that the court can do so.

In making these findings, it will be

appropriate for the district court to consider Ward's challenge to the orthodoxy of the rabbi who testified on behalf of the state. In religious matters, we take judicial notice of the fact that often the keenest disputes and the most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what that faith requires in particular matters. *See Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981). In this case, Ward is entitled to argue, with appropriate authorities, that his religious belief is different from the interpretation provided by the witness for the state.

The third *Turner* factor requires us to consider the "impact accommodation . . . will have on guards and other inmates, and on the allocation of prison resources generally." *Washington v. Harper*, 494

U.S. 210, 225 (1990). Although the district court made no findings regarding this factor, we accept the warden's contention that if other prisoners are not similarly accommodated, they might well perceive Ward as being favored. *Kahey* 836 F.2d at 951. "This perception [could] have an adverse impact on prison morale," *id.*, causing disruption throughout the prison. This effect, however, is present in every case that requires special accommodations for adherents to particular religious practices. While not irrelevant, it is not in itself dispositive.

[4] More important are the administrative difficulties that could potentially arise in accommodating Ward's request. Common sense tells us that there would be some disruption to the efficient operation of culinary services if the prison were required to provide a

special meal for one prisoner. The district court, however, made no findings regarding how great the disruption would be. Indeed, the district court made no findings regarding whether the prison had explored the possibility of accommodating Ward. Although we must give deference to the prison official's own assessment of the burden on prison operations, we cannot simply accept the warden's assertion on appeal that the disruption would be significant. Likewise, the district court made no findings regarding the financial impact of accommodation. Again, it is clear that providing a kosher diet would give rise to some expense, not only from the cost of Ward's meals but also from the cost of accommodating others with similar claims of entitlement to a religious diet. We cannot determine how heavily this factor weighs in the prison's favor, however,

because the magnitude of these costs is a factual question for which the district court made no findings.

. . .

[5] Finally, under the fourth factor, we must consider whether there are ready alternatives to the prison's current policy that would accommodate Ward at de minimis cost to the prison. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation," *Harper*, 494 U.S. at 225, while the existence of alternatives may be "evidence that the [policy] is not reasonable but is an 'exaggerated response' to prison concerns," *Turner* 482 U.S. at 90-91. Here, the prison policy is to limit the accommodation of religious dietary laws to the provision of pork-free diets. On the record before us, we simply are unable to determine whether reasonable alternatives to this

policy exist. Complying with every precept of the Kashruth, the Jewish dietary law, may involve significant expense; however, it may be possible to comply with the laws in substantial part at de minimis cost. For example, it may be possible to provide Ward with non-defiled foodstuffs, even if the dining area is not kept kosher. The district court, however, made no findings regarding the feasibility of such alternatives; we cannot speculate about their existence or the impact they would have on culinary services.

[6] In the absence of sufficient factual findings regarding the second, third, and fourth factors, it is impossible for us to determine whether the denial of a kosher diet is reasonably related to the prison's legitimate interest in streamlined food service. In *McElyea* we established the principle that

inmates have the right to be provided with food that satisfies the dietary laws of their religion. *McElyea* 833 F.2d at 198. Abrogation of this important right cannot be justified by the rote recitation of the *O'Lone* standard. The failure to provide a kosher diet may require Ward to defile himself in a manner not contemplated by *O'Lone*. Moreover, unlike the claimants in *O'Lone*, Ward's religious practice in general has been significantly curtailed by the fact of incarceration in the remote prison. In such circumstances, it is necessary to evaluate carefully the justifications proffered by the prison before determining whether the Constitution allows the intrusion into the free exercise right of the inmate. We remand this claim so that the district court can make specific factual findings and can engage in a careful balancing of all the

Turner factors.

III

Ward argues that he must be allowed to have candles in his cell to observe certain rituals of his religion. The warden asserts that candles pose a significant fire hazard, and thus under no circumstances are prisoners allowed to have them in their cells. The *Turner* factors clearly weigh in favor of the prison officials on this claim. The serious safety and security concerns raised by allowing inmates to possess and use candles outweigh the curtailment of Ward's religious practice. Thus, we conclude that the regulation is reasonably related to a legitimate penological purpose and thus is valid under *Turner*.

IV

[7] Ward argues that the warden violated his First Amendment rights when

it transferred him to Ely on the Sabbath. He asks for an injunction to prevent the prison from transporting him on any

. . .

Sabbath or Jewish holiday, comprising eighty-eight days in the year.

Again, the application of the *Turner* factors leads to the conclusion that the prison's policy is reasonably related to a legitimate governmental interest. First, the prison has a legitimate penological interest in having a standardized, efficient transportation system. Prisoners are transported for medical, security, and other reasons. According to the warden, the health, safety, and welfare of the prisoners is dependent upon the ability to move prisoners quickly and efficiently when necessary. The prison policy of not guaranteeing that inmates will be transported only on certain days is

logically connected to the legitimate government interest in security and efficient transportation.

. . .

Second, Ward does not contend that the prison intends to transfer him on *every* Sabbath. Because he can observe most Sabbaths, we conclude that he has alternative means of exercising his religion as contemplated by *O'Lone*.

Third, a hard and fast rule that Ward and other Jewish prisoners could never be transported on the Sabbath or holidays could have a significant impact on guards, other inmates, and prison resources. Such a policy could disrupt the efficient administration of the transportation system at the prison.

[8] Fourth, Ward does not offer any alternatives that could fully accommodate his rights at de minimis costs to valid penological interest. The prison's

current transportation policy is to accommodate the religious beliefs of the inmates when at all possible. Given this

. . .

policy, we conclude that Ward is not entitled to the injunction he seeks.

V

Ward has requested that the prison provide him with an Orthodox rabbi. since Ward is the only Orthodox Jewish prisoner in the institution, the prison does not have a rabbi on staff. It is not clear whether the prison made any effort to contact an Orthodox rabbi on Ward's behalf; however, a prison official testified that there were no Orthodox Jewish rabbis within a one hundred mile radius of the prison. No rabbi has volunteered to come to the prison. The prison, however, in no way restricts Ward's ability to contact a rabbi on his own to come into the prison, nor does it

forbid rabbis from coming into the prison. Thus, the issue here is whether the prison has an affirmative obligation to provide a rabbi for Ward.

[9] We have previously held that prison officials have no such obligation. In *Allen v. Toombs*, 827 F.2d 563, 569 (9th Cir. 1987), we concluded that a "prison administration is not under an affirmative duty to provide each inmate with the spiritual counselor of his choice." *Accord Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (dicta). Thus, the prison has not infringed upon Ward's right to free exercise by not providing a rabbi.

Ward argues that he would have access to a rabbi if he were moved to a different prison. However, the prison officials point out that Ward is a maximum security prisoner, and that Ely is the only maximum security prison in

the Nevada prison system. We cannot conclude that Ward's placement at Ely is not reasonably related to a legitimate penological purpose, and therefore, we must affirm the district court on this issue.

VI

Ward argues that the prison has an affirmative obligation to provide him with clothing that is made with only one fiber. The prison has refused to do so, but has informed Ward that he may provide his own clothing as long as it conforms to the prison dress code. All prisoners are required to wear solid blue denim clothing.

[10] Ward does not question the necessity of the prison's policy regarding prisoners to dress uniformly. Rather, his argument focuses on whether the prison has an affirmative obligation to provide him with clothing that

conforms to the dictates of his religion. We conclude that under the *Turner* standard, the prison does not have such an obligation. The third and fourth factors of *Turner* are determinative. Allowing one prisoner to receive preferential treatment with regard to clothing could potentially cause conflicts among inmates and providing each prisoner with the clothing or other implements necessary to the practice of their religion would impose a cost that would be more than de minimis. We conclude that the prison's policy of allowing Ward to buy and to wear his own clothing satisfies the *Turner* standard.

VII

Ward seeks an injunction ordering the prison to allow Jewish inmates to wear religious jewelry, yarmulkes, and talliths (prayer shawls). It appears, however, that inmates are already allowed

to possess and to wear these items under existing prison policy. Since Ward can show no injury that can be redressed by the injunction he seeks, he has no standing to bring this claim. *See, e.g., Valley Forge Christian College v. Americans United for a Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

VIII

In a letter of April 26, 1993, addressed to this court, Ward has raised a question of retaliation for bringing this suit. We are in no position to adjudicate this contention, but if Ward's claims are true, there would have been serious interference with the jurisdiction of this court. On remand, we assume that the district court will have the opportunity to examine these contentions, which relate to Ward's access to this court on appeal.

Each party to bear its own costs.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON McKINLEY WARD, Petitioner-Appellant, vs. JESSIE WALSH, ASSOCIATE WARDEN OF PROGRAMS, Respondent-Appellee.	)	No. 91-15427 D.C. No. CV-N-89-00265-HDM ORDER

Before: CHOY, NOONAN, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Judges Noonan and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Choy has so recommended. The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

. . .

. . .

Appellee's petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Treating appellant's request for a temporary restraining order as a petition for rehearing, the request is DENIED.